

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2011 DEC -2 AM 11:38

N. ANAYA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff,

vs.

KAWAIAHA'O CHURCH, FRANK
PESTANA in his official capacity as the Chair
of the Board of Trustees and Chair of the
Board of Directors of Kawaiaha'o Church,
DEPARTMENT OF LAND AND NATURAL
RESOURCES, BOARD OF LAND AND
NATURAL RESOURCES, WILLIAM AILA,
JR. in his official capacity as chairperson of
the Board of Land and Natural Resources and
as the State Historic Preservation Officer,
PUAALAOKALANI AIU in her official
capacity as administrator of the State Historic
Preservation Division, DEPARTMENT OF
HEALTH, LORETTA FUDDY in her official
capacity as the director of the Department of
Health, ALVIN ONAKA in his official
capacity as State Registrar of Vital Statistics
and Chief of the Department of Health's
Office of Health Status Monitoring,

Defendants.

) CIVIL NO. 11-1-2816-11 ECN

)
)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER GRANTING
) PLAINTIFF'S MOTION FOR
) PRELIMINARY INJUNCTION FILED
) NOVEMBER 18, 2011

PRELIMINARY INJUNCTION HEARING:

DATE: November 29, 2011

TIME: 8:30 am

JUDGE: Honorable Edwin C. Nacino

I do hereby certify that this is a full, true, and
correct copy of the original on file in this office.


Clerk, Circuit Court, First Circuit

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

This civil action arises out of the construction of a new Multi-Purpose Center ("MPC") on property owned by Defendant Kawaiaha'o Church. On November 16, 2011, Plaintiff Paulette Ka'anohiokalani Kaleikini, ("Plaintiff") filed a complaint for declaratory and injunctive relief.

On November 18, 2011, Plaintiff filed a Motion For Preliminary Injunction. A hearing on Plaintiff's Motion For Preliminary Injunction was held on November 29, 2011. David K. Frankel, Esq. and David Kopper appeared on behalf of Plaintiff. James Kawashima, Esq. and Michael A. Lorusso, Esq. appeared on behalf of Defendants Kawaiaha'o Church and Frank Pestana, in his official capacity as the Chair of the Board of Trustees and the Chair of the Board of Directors of Kawaiaha'o Church (collectively, "Church Defendants"). Marie M. Gavigan, Esq. appeared on behalf of the Department of Land and Natural Resources, Board of Land and Natural Resources, William Aila, Jr., in his official capacity as Chairperson of the Board of Land and Natural Resources and as the State Historic Preservation Officer, Puaalaokalani Aiu, in her official capacity as administrator of the State Historic Preservation Division, Department of Health, Loretta Fuddy in her official capacity as the director of the Department of Health, and Alvin Onaka, in his official capacity as State Registrar of Vital Statistics and Chief of the Office of Health Status Monitoring of the Hawaii State Department of Health (collectively, "State Defendants").

The Court and the parties agreed that the narrow issue before the Court is whether Church Defendants can pour concrete, compact the ground, or build the MPC prior to removal, or decertification, of Kawaiaha'o Church's cemetery pursuant to HRS Chapter 441. Due to the Court's concern regarding the potential for any overlap of the issues involved in *Hall v. DLNR*,

Civ. No. 09-1-1828-08 KKS, the Court and the parties agreed only to the introduction of evidence and argument that related to HRS Chapter 441, standing, and irreparable harm, and the Court makes no other findings or conclusions regarding any additional claims of relief sought by Plaintiff in her Motion for Preliminary Injunction and Complaint.

During the hearing, parties presented testimony from a total of eight live witness and exhibits were accepted into evidence by the Court. The Court, having heard this matter on November 29, 2011, and after due and careful consideration of all pleadings, testimony, stipulations, exhibits, and legal arguments submitted, hereby makes the following Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion For Preliminary Injunction:

FINDINGS OF FACT

1. Plaintiff filed her complaint for declaratory and injunctive relief on November 16, 2011.
2. The project at issue in this case is referred to by the parties as the MPC Project and involves Kawaiaha'o Church's replacement of its social hall, known as Likeke Hall, and an adjacent office building with a new MPC.
3. The MPC Project site ("MPC site") is located at Kawaiaha'o Church, 927 Punchbowl St., Honolulu, Ahupua'a, Kona District, Island of Oahu [TMK: (1) 2-1-032:017].
4. At the commencement of the preliminary injunction hearing on November 29, 2011, the Court ordered the terms of the temporary restraining order to continue until a decision is rendered on the motion for preliminary injunction.
5. The preliminary injunction hearing commenced and concluded on November 29, 2011.
6. The Court admitted into evidence Plaintiff's Exhibits 2, 3, 4, 5, 25, 26, 35, 36, and

38 as well as Church Defendants' Exhibits KC-1, 2, 3, 4, 5, and 6.

7. The Plaintiff called the following witnesses: Kai Markell, Hal Hammatt, David Shideler, Frank Pestana, Pua Aiu, Alvin Onaka, and Paulette Ka'anohiokalani Kaleikini. The Church Defendants called their only witness, LeeAnn Crabbe.

8. Prior to commencement of Church Defendants' MPC Project, the Church's archaeologist believed that it was highly likely that burials would be encountered in the course of the project.

9. Over thirty burials have been found at the Church Defendants' MPC site.

10. The majority of the area beneath the MPC site has not yet been excavated.

11. The parties stipulated that the MPC site was dedicated a cemetery pursuant to HRS Chapter 441.

12. The parties stipulated that MPC site has not been decertified as a cemetery in accordance with HRS Chapter 441.

13. The parties stipulated that burials are presently located at the proposed MPC site.

14. The parties stipulated that some concrete has been poured and some compacting has taken place at the MPC site.

15. Church Defendants are not planning on decertifying the cemetery prior to further compacting of the ground or pouring more concrete for the MPC Project.

16. Church Defendants are planning on proceeding with construction of the MPC Project.

17. Church Defendants have represented that the purposes of the MPC Project are for an education office, nursery, archives, library, museum, general meeting rooms, social hall, Sunday school classrooms, Kahu's office and kitchen. The MPC Project is intended to enable

the Church to better provide for education, recreation, outreach, community affairs, outreach and protection of archives and artifacts.

18. In its multiple descriptions of the MPC Project to state agencies and in its pleadings, Church Defendants have not asserted that the MPC Project has any cemetery purpose, is necessary and incidental to the proper maintenance of the cemetery, or is for the permanent interment of human remains.

19. The Hawai'i Island Burial Council has recognized Plaintiff as a lineal descendant of Umiulaakaahumanu, who is the mother of Kahouokalani.

20. Plaintiff testified that she is a descendant of Kahouokalani.

21. Plaintiff testified that Kahouokalani's descendants were buried on the grounds of Kawaiaha'o Church.

22. Plaintiff testified that Kahouokalani's descendants buried on the grounds of Kawaiaha'o Church are: David Kanuha, Esther Holstein, Mary Kamaka, William Luther Moehonua and G.W. Keaweamahi ('ohana).

23. The three burial plots of Holstein (Lot 17), Kanuha (Lot 18), and Kamaka (Lot 25) were formerly within the footprint of the former Likeke Hall, which is the location of the MPC site.

24. Pit features, which have not yet been fully investigated and which could contain burials, exist where burial lots 17, 18 and 25 were.

25. The Church's archaeologists were not able to conclude that David Kanuha, Esther Holstein or Mary Kamaka's remains were removed from the grounds of Kawaiaha'o Church.

26. Although some burials were removed from the grounds of Kawaiaha'o Church,

there is no evidence that the remains of all of Plaintiff's `ohana were removed.

27. In Hawaiian culture, iwi are of immense cultural significance – whether found in a Christian cemetery or not.

28. Harming iwi or graves – whether found in a Christian cemetery or not – can have a profound impact on those who feel a responsibility to protect them.

29. Plaintiff has deeply held beliefs and practices regarding the protection of iwi and graves – particularly those of her `ohana.

30. Plaintiff engages in Native Hawaiian traditional and customary practices including mālama iwi.

31. Plaintiff testified that she would be injured if the area underneath the MPC site is used for non-cemetery purposes.

32. To the extent that these findings of fact contain conclusions of law, they shall be so considered and construed.

CONCLUSIONS OF LAW

1. Under Hawaii law, the test for injunctive relief is threefold: (1) Is the party seeking an injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor issuance of an injunction? (3) To the extent that the public interest is involved, does it support granting the injunction?

2. HRS § 441-15 provides:

Property dedicated to cemetery purposes shall be held and **used exclusively for cemetery purposes unless and until the dedication is removed** from all or any part of it by an order and decree of the circuit court of the judicial circuit in which the property is located and the decree is filed in the bureau of conveyances or land court in a proceeding brought by the cemetery authority for that purpose and upon notice of hearing and proof satisfactory to the court:

(1) That no interments were made in or that all interments have been removed from that portion of the property from which dedication is sought to be removed;

(2) That the portion of the property from which dedication is sought to be removed is not being used for interment of human remains.

3. HRS § 441-16 provides:

The notice of hearing provided in section 441-15 shall be given by publication once a week for at least three consecutive weeks in a daily newspaper of general circulation in the county where the cemetery is located, and the posting of copies of the notice in three conspicuous places on that portion of the property from which the dedication is to be removed. The notice shall:

- (1) Describe the portion of the cemetery property sought to be removed from dedication;
- (2) State that all remains have been removed or that no interments have been made in the portion of the cemetery property sought to be removed from dedication;
- (3) Specify the time and place of the hearing.

4. The fundamental starting point for statutory interpretation is the language of the statute itself.

5. Where the language of the statute is plain and unambiguous the court's sole duty is to give effect to its plain and obvious meaning.

6. The Court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Moreover, the Court may also resort to extrinsic aids in determining legislative intent.

7. The legislative purpose in enacting HRS Chapter 441 was to safeguard the interests of the general public with respect to cemeteries and cemetery salesmen, and to ensure that dedicated cemeteries be used exclusively for cemetery purposes.

8. In enacting HRS Chapter 441, the legislature noted that the bill contained comprehensive provisions relating to the dedication of property for cemetery purposes.

9. HRS § 441-1 does not define "cemetery purpose." However, the Court concludes, in conjunction with the definition of "cemetery" under HRS § 441-1, that "cemetery purpose" also includes that which is necessary and incidental to the proper maintenance of the

cemetery and for the permanent interment of human remains.

10. HRS § 441-1 does not define “use.” Notwithstanding its plain meaning, the Court concludes that “use,” for the purposes of HRS Chapter 441, also includes construction, reconstruction, demolition, or alteration of any structure, building, or facility on the land.

11. The Court concludes that the MPC site was dedicated a cemetery and falls within the statutory definition of “cemetery” pursuant to HRS § 441-1.

12. The Court concludes that the MPC Project, at this point in time, is not for cemetery purposes, is not necessary and incidental to the proper maintenance of the cemetery, nor is it for the permanent interment of human remains.

13. Based on the Court’s conclusion in the preceding paragraph, Church Defendants’ planned actions of pouring of concrete, compacting of the ground and any other construction activity at the MPC site are premature because HRS § 441-15 plainly states that, “Property dedicated to cemetery purposes **shall be held and used exclusively** for cemetery purposes unless and until the dedication is removed”

14. Notwithstanding the aforementioned, excavation activities consistent with any existing and applicable permits issued for the purpose of disinterment and necessary to comply with HRS § 441-15(1) and (2) may continue.

15. As a person who asserts that she has `ohana buried where the MPC Project is proposed to be constructed, Plaintiff has standing for the purposes of this proceeding.

16. The Court concludes that Plaintiff has shown the likelihood of succeeding on the merits of the case.

17. The balance of irreparable harm favors granting the injunction to prevent the non-cemetery use of land dedicated exclusively for cemetery purposes until all known burials are

properly disinterred and dedication is removed for those relevant portions of Kawaiaha'o Church's cemetery property.

18. The public interest favors the protection of cemeteries and the issuance of this injunction.

19. The Plaintiff's Motion for Preliminary Injunction is Granted.

20. To the extent that these conclusions of law constitute findings of fact, they shall be so considered and construed.

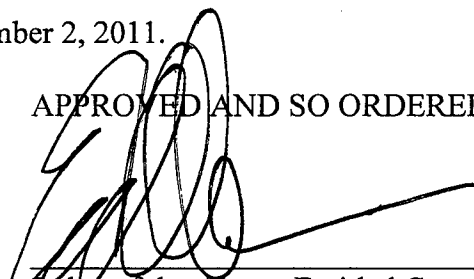
ORDER

Pursuant to the above Findings of Fact and Conclusions of Law, the Court hereby GRANTS Plaintiff's Motion for Preliminary Injunction.

Church Defendants are enjoined from pouring concrete, engaging in any soil compaction, or engaging in any other construction activity on the MPC site until such time as the dedication of the cemetery is properly removed pursuant to HRS §§ 441-15 and 441-16 or until further order of the Court.

DATED: Honolulu, Hawaii, December 2, 2011.

APPROVED AND SO ORDERED,



Judge of the Above-Entitled Court

CERTIFICATE OF SERVICE

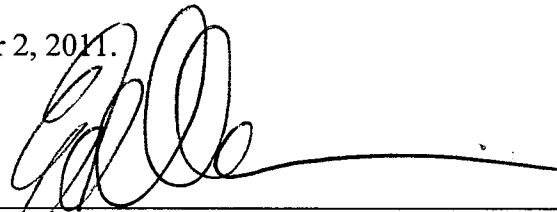
I hereby certify that a copy of the foregoing document was duly served on the party named below at their last known address via hand delivery on the date of filing herein.

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DATED: Honolulu, Hawaii, December 2, 2011.



Judge of the Above-Entitled Court